Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors

HIGH COURT (MIRI) — SUIT NO 22–69 OF 2002 (MR)
ABDUL AZIZ ABDUL RAHIM JC
29 MARCH 2004

Civil Procedure — Injunction — Application for — Payment of retirement benefits — Whether there are triable issues — Whether plaintiffs entitled to seek order to preserve money in funds — Whether order oppressive to defendants — Rules of the High Court 1980 O29 rr 1, 2 and O 30.

The plaintiffs were former employees of D1 and D2 and also members of SSS-RBF and SSS-PF ('The Funds') set up by D1 and D2 vide Trust Deeds. These Funds are domestic retirement funds/provident funds of D1 and D2. The above funds were managed by a Board of Trustees ('Trustees') and were established by two Trust Deeds (the 1968 Deed and the 1976 Deed). The plaintiffs claimed that upon their retirement they were not paid the full amount of the benefits that they were entitled to owing to unauthorized deductions made from the Fund that were related to Employees Provident Fund (EPF) contributions made by D1 and D2. The plaintiffs claim that they have a right to the sum that had been wrongfully deducted pursuant to cl 7 of the Trust Deeds and were still lying in the Funds, that the deductions were illegal, null and void and contravened the Employees Provident Fund Act 1951 and the Employees Provident Fund Act 1991 and that regs 5(2) and 7(1) of the 1976 Deed were *ultra vires* the Act. The defendants challenged the plaintiffs' interpretation as to the manner the deductions were done, and the plaintiffs contended that fund should be preserved so that in the event the plaintiffs' claim is successful, the plaintiffs could enforce it against the Funds and Trustees. The plaintiffs made this application under O 29 r 2 of the Rules of the High Court 1980 ('RHC') to preserve the funds because it came to their knowledge that D1 and D2 were about to pay out the money in the Funds to current members and close the Funds without taking into account the plaintiffs' claim. The plaintiffs also made an application to appoint a receiver.

Held, allowing part of the application:

(1) The court need not go into the merits of the plaintiffs' claim or the defendants' defence but has only to be satisfied that there are serious questions either of fact or law to be tried. If there were such questions, the court would have to consider, on the balance of convenience, whether or not to grant the application. The court would have to consider several factors *inter alia*, the hardship to the plaintiffs and defendants, the defendants' undertaking to meet the plaintiffs' claim if it is successful and whether the defendants were financially able to meet their undertaking (see para 10).

(2) In this case there are serious issues to be tried namely the question of interpretation and construction of various clauses in the Trust Deed and their regulations and also the manner in which the accounting procedure was undertaken in relation to the deductions. There is also the issue of the validity of regs 5(2) and 7(1)(c) of the 1976 Deed (see para 13).

(3) As to the balance of convenience, D1 and D2 would be able to meet their obligations if plaintiffs' claim is successful given their annual audited income. The issue here was that the plaintiffs were claiming against the Trustees and the Funds. It was the assets that were within the Funds that mattered as the Trustees had no control over monies which have not been paid into the Funds (see para 14).

(4) The plaintiffs were entitled to full disclosure of the state of the Funds, its assets and liabilities by virtue of cll 30(1) and 31(1) of the 1968 and 1976 Deeds (see para 15).

(5) If the plaintiffs were entitled to be paid from the Funds then they can have the injunction and the court may appoint a receiver to give effect to the injunction. In this case the plaintiffs have a right to the Funds if their interpretation and construction of the Deeds was correct. This was the triable issue. The receiver if appointed should not be given the same powers and authority as the Trustees in managing the amount of money from the Funds that is to be set aside for the purpose of the plaintiffs' claim because the Trustees are entrusted with the duty of determining who are the members entitled to receive the retirement benefits from the Funds, to ascertain the amount of the entitlement and to distribute them accordingly. The receiver that is to be appointed is not required to do all these until the plaintiffs have successfully proved their case; *Cummins v Perkins* [1899] 1 Ch 16 followed (see para 16).

(6) The plaintiffs' concern was that an adequate sum of money, RM50m be set aside to meet their claim if successful. D1 and D2 would still be able to distribute the funds to current members as long as the said sum was preserved. The fact that no proper account of the funds was made available either to the court or to the plaintiff made it difficult to evaluate the extent of the oppression to the defendant (if any) by granting the order. If such an account had been taken and if it was shown that at the date of filing the suit the funds had to its credit a sum in excess of RM50m then the defendants could distribute the excess in order to effect the closure of the Funds (see paras 18 and 19).

(7) The order will not cause any loss or damage to D1 and D2 as the sum would be kept in an interest bearing account and in the event the plaintiffs fail in this suit the money together with the interest will be credited to D1 and D2 to be disposed of in any manner according to the terms of the trust deeds (see para 20).

[**Bahasa Malaysia summary**

Plaintif-plantif adalah bekas pekerja D1 dan D2 dan juga adalah ahli-ahli SSS-RBF dan SSS-PF ('Tabung itu') yang ditubuh oleh D1 dan D2 melalui Suratikatan Amanah. Tabung ini adalah tabung persaraan dalam negeri/ kumpulan simpanan wang D1 dan D2. Tabung yang dikatakan telah diurus oleh Lembaga Pemegang Amanah ('Pemegang Amanah') dan telah ditubuhkan oleh dua Suratikatan Amanah (Suratikatan 1968 dan Suratikatan 1976. Plaintif-plaintif telah mendakwa bahawa setelah mereka bersara mereka

tidak dibayar jumlah keseluruhan yang sepatutnya dibayar kerana potongan yang tidak sah telah dibuat daripada Tabung tersebut yang berkait dengan caruman Kumpulan Wang Simpanan Pekerja (KWSP) D1 dan D2. Plaintif-plaintif mendakwa bahawa mereka berhak kepada jumlah yang telah dipotong tanpa disahkan menurut kl 7 Suratikatan Amanah dan yang masih berada di Tabung tersebut, bahawa potongan itu adalah batal dan tak sah dan melanggar Akta Kumpulan Simpanan Wang Pekerja 1951 dan Akta Kumpulan Wang Simpanan Pekerja 1991 dan peraturan-peraturan 5(2) dan 7(1) Suratikatan 1976 adalah ultra vires Akta itu. Defendan-defendan mencabar tafsiran plaintif-plaintif tentang cara potongan dibuat, dan plaintif-plaintif menhujahkan bahawa Tabung tersebut seharusnya dikekalkan sebab jikalau permohonan plantif-plaintif dibenarkan, plantif-plaintif dapat menguatkuasakannya terahadap Tabung itu dan Pemegang Amanah. Plaintif-plaintif memfailkan permohonan ini di bawah A 29 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengekalkan Tabung itu setelah mendapat tahu D1 dan D2 berniat membayar wang di dalam Tabung tersebut kepada ahli-ahli semasa and menutup Tabung tersebut tanpa mengambil perhatian tentang permohonan plaintif-plaintif. Plaintif-plaintif juga telah memohon untuk perlantikan seorang penerima.

Diputuskan, membenarkan sebahagian daripada permohonan tersebut:

(1) Mahkamah tidak perlu menimbang merit permohonan plaintif-plaintif ataupun pembelaan defendan-defendan tetapi hanya perlu berpuas hati bahawa terdapat persoalan fakta ataupun undang-undang yang serius untuk dibicarakan Jika terdapat persoalan seperti itu, mahkamah akan mempertimbangkan, pada imbangan kemudahan, sama ada untuk membenarkan permohonan itu. Mahkamah perlu mempertimbangkan beberapa faktor, antara lain, kesusahan kepada plaintif-plaintif dan defendan-defendan, akujanji defendan-defendan untuk memenuhi tuntutan plaintif-plaintif jika ia berjaya dan sama ada defendan-defendan boleh memenuhi akujanji mereka secara kewangan (lihat perenggan 10).

(2) Di dalam kes ini terdapat persoalan serius yang perlu dibicarakan iaitu persoalan tafsiran terma-terma di dalam Suratikatan Amanah dan peraturannya dan juga prosedur perakaunan dilakukan berkait dengan potongan itu. Terdapat juga isu keesahan peraturan-peraturan 5(2) dan 7(1)(c) Suratikatan 1976 (lihat perenggan 13).

(3) Berkait dengan keseimbangan kemudahan, D1 dan D2 dapat memenuhi obligasi mereka jikalau permohonan pliantif-plaintif dibenarkan memandangkan audit pendapatan tahunan mereka. Isu di sini adalah plaintif-plaintif membuat tuntutan terhadap Lembaga Pemegang Amanah dan Tabung tersebut. Asset yang berada di dalam Tabung tersebut penting kerana Pemegang Amanah tidak dapat mengawal wang yang belum dibayar kepada tabung tersebut (lihat perenggan 14).

(4) Plaintif-plaintif berhak kepada pendedahan penuh keadaan Tabung itu, aset-aset dan liabiliti-liabiliti mengikut kll 30(1) dan 31(1) Suratikatan 1968 dan 1976 (lihat perenggan 15).

(5) Jika plaintif-plaintif berhak untuk dibayar daripada Tabung itu mereka boleh mendapat injunksi dan mahkamah akan melantik seorang penerima untuk memberi kesan kepada injunksi itu. Di dalam kes ini plaintif-plaintif mempunyai hak kepada Tabungitu jika tafsiran Suratikatan mereka adalah betul. Ini merupakan isu yang boleh dibicarakan. Penerima, jika dilantik, tidak patut diberi kuasa yang sama seperti Pemegang Amanah di dalam menguruskan wang daripada Tabung yang perlu disimpan untuk tujuan tuntutan plaintif-plaintif kerana Pemegang Amanah telah diamanahkan dengan tanggungjawab untuk menentukan ahli-ahli yang dapat menerima faedah-faedah persaraan daripada Tabung itu, untuk mengetahui jumlah berhak dan untuk mengedarkannya (lihat perenggan 16).

(6) Apa yang penting kepada plaintif-plaintif adalah sejumlah wang yang mencukupi, RM50j akan disimpan unutk memenuhi tuntutan mereka jika tuntutan mereka berjaya. D1 dan D2 masih dapat mengedarkan wang kepada ahli-ahli semasa jika jumlah yang dikatakan itu disimpan. Fakta bahawa tiada akaun yang sewajarnya dikemukakan kepada mahkamah atau plaintif-plaintif menjadikannya susah untuk menilai takat penindasan kepada defendan-defendan (jika ada) dengan memberikan perintah itu. Jika akaun sebegitu telah dikemukakan dan jika dapat ditunjukkan bahawa pada tarikh pemfailan guaman itu terdapat wang lebih daripada RM50j di dalam Tabung itu, defendan-defendan dapat mengedarkan wang yang lebih untuk memberi kesan kepada penutupan Tabung itu (lihat perenggan 18 dan 19).

(7) Perintah ini tidak akan menyebabkan kerugian ataupun kehilangan kepada D1 dan D2 kerana jumlah wang itu akan disimpan di dalam akaun yang membayar faedah dan sekiranya plaintif-plaintif gagal dalam guaman ini wang bersama dengan faedah tersebut akan dikreditkan kepada D1 dan D2 untuk diuruskan mengikut terma-terma Suratikatan Amanah (lihat perenggan 20).]

Notes

For cases on application for injunction, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2464–2471.
For interlocutory injunctions in general, see 1 *Halsbury's Laws of Malaysia*, para [10.5–027].

Cases referred to

Cummins v Perkins [1899] 1 Ch 16 (folld)

Legislation referred to

Employees Provident Fund Act 1951
Employees Provident Fund Act 1991
Rules of the High Court 1980 O 29 rr 1, 2, O 30

Dato' Cyrus Das (Gabriel Kok with him) (Khoo & Co Advocates) for the plaintiffs.
Robert Lazar (Jimmy HT Wee with him) (Jimmy HT Wee & Co Advs) for the defendants.

Abdul Aziz Abdul Rahim JC:

Finding

[1] This is an application under O 29 rr 1 and 2 and O 30 of the Rules of the High Court 1980 ('RHC'). Order 29 r l is for injunction generally. Order 29 r 2 is specific ie for preservation of property the subject matter of a cause or matter.

[2] The plaintiffs claimed that they were formerly employees of Dl and D2. At the material times also the plaintiffs were members of SSS-RBF and SSS-PF ('the Funds') set up by Dl & D2 vide Trust Deeds (exhs A & B in the plaintiffs' supporting affidavit). These funds are domestic retirement funds/ provident funds of Dl & D2. At the material times also the plaintiffs are members of the statutory EPF. The plaintiffs claimed that upon it setting up, the Funds are managed and administered by a Board of Trustees ('Trustees') — the current Trustees are defendants 3-9 (with the exception D4, against who the action has been discontinued) and they are being sued in that capacity.

[3] The background to the establishment of the Funds is given in para 7 of plaintiffs' statement of claim. From the material facts pleaded in statement of claim it seems that the Funds in question were established by two Trust Deeds — namely — the 1968 Deed and the 1976 Deed. The 1976 Deed was revised in 1993 and 1996 (see paras 12, 13, 14, 15 and 16 of plaintiffs' statement of claim). Looking at the two Trust Deeds, I found that the Fund that was established under the 1968 Deed is a contributory fund, but the Fund established under the 1976 Deed is a non-contributory Fund.

[4] The plaintiffs claimed that the Funds were created to provide for retirement benefits of the employees of Dl & D2. Therefore, in para 18 of statement of claim the plaintiffs said that they have legitimate expectation towards the fund. However the plaintiffs claimed, in paras 18–22, that when they were paid their retirement benefits under the Funds upon their retirement they were short-changed by Dl & D2 and the Trustees in that they were not paid the full amount of the benefit they were entitled to from the Funds. The plaintiffs alleged that this happened because D1 & D2 had made unauthorised deductions pursuant to cl 7 of the Trust Deeds. In particular the plaintiffs claimed that these deductions were deductions related to EPF contributions made by D1 & D2 for the plaintiffs and the interest/dividends declared by EPF as to deductions.

[5] The plaintiffs thus claimed that such deductions were illegal, null and void and contravened the provisions of the Employees Provident Fund Act 1951 and Employees Provident Fund Act 1991 and sought declaration that regs 5(2) and 7(1)(c) of the 1976 Deed were *ultra vires* the Act.

[6] The gist of the plaintiffs' claim therefore is this: Dl and D2 and the Trustees had wrongfully made deductions from their retirement benefits entitlement under the Funds, which are trust funds, when making payment under the Funds upon the plaintiffs' retirement. Therefore the plaintiffs have a right to the sum that had been wrongfully deducted and was still lying in

the Funds. Therefore the plaintiffs said that since the defendants are challenging the plaintiffs' interpretation as to the manner the deductions were done, the Funds should be preserved, so that in the event the plaintiffs' claim is successful, then the plaintiffs could enforce it against the Funds and the Trustees.

[7] The plaintiffs are making this application under O 29 r 2 because, it has come to the plaintiffs' knowledge that Dl and D2 are about to close the Funds and pay out the money in the Funds to the current members. In so doing, according to the plaintiffs, Dl and D2 have not taken into account the plaintiffs' claim, although the claim was forwarded to Dl and D2 as early as 29 November 2002.

[8] Order 29 r 2 is a special case of injunction in that it is the preservation of property — the subject matter of the litigation. In this case the plaintiffs have shown that the Funds are the subject matter of their claim. It is a specific property. Therefore I think the application is rightly made under O 29 r 2.

[9] The plaintiffs also have shown that Dl and D2 were not giving any regard to the plaintiffs' claim against the Funds when Dl and D2 expressed the intention to close the Funds. This fact is not denied by the defendants.

[10] In deciding this application, the court need not go into the merits of the plaintiffs' claim or the defendants' defence. The law on this point is settled. The court has only to be satisfied that there are serious questions, either fact or law, to be tried. If there is such a question then the court will have to consider — on the balance of convenience — whether or not to grant the application sought; the remedy being an equitable remedy. To tip the scale of justice, on the balance of convenience, the court would have to consider several factors:

1) the hardship that would be caused to the plaintiffs if the application was refused and to weigh this against the hardship that would be caused to the defendants if the application was allowed;

2) whether an undertaking by defendants (in this case by D1 and D2) to meet the plaintiffs' claim, if it is successful, is sufficient to refuse the application in this instant case;

3) whether the defendants are in a position financially to meet its undertaking and satisfy the judgment in favour of the plaintiffs.

[11] The plaintiffs argued that if the defendants were allowed to proceed with the closure of the Funds without setting aside the sum claimed by the plaintiffs, the plaintiffs if successful, would only get a barren judgment, because by then the Funds would have been fully distributed and the Trustees discharged. The plaintiffs said under reg 30(1) – exh A – 1968 Deed (note: reg 3 of the 1968 Deed – two category of members – contributing and non-contributing members) – only refers to the rights of members against the Trustee and the Fund. A similar provision is found in cl 31(1) of exh B – the 1976 Deed (note: the 1976 Deed – is non contributory Fund). Therefore learned counsel for plaintiffs submitted that it is necessary to maintain the status quo.

[12] The defendants reply to this agreement is twofold: 1) that the worry by the plaintiffs was misplaced. D1 and D2 were and are in fact the contributories to the Funds and that Dl and D2 will meet all obligations under any judgment if the plaintiffs are successful in their claim and 2) that the defendants (ie Dl & D2) are not $2 companies. Dl and D2 have had a long and illustrious presence in Malaysia for decades and have very good reputations for meeting its obligations. The defendants also argued that if the application is granted then the current members will not get paid from the Funds if the defendants are to proceed with the closure. Another argument by defendants in resisting the application is that the application is akin to a Mareva injunction and if so, it fails to meet the test of a Mareva injunction and therefore should not be granted.

[13] The plaintiffs also prayed in this application for the appointment of a receiver to safeguard the amount that is to be preserved in the Funds. In response to this prayer, the defendants' counsel referred to a passage in *Lewin On Trust* (2000 Ed) at p 1185 which says that the court may appoint a receiver only where it is shown that the trustee is insolvent or a bankrupt or of bad character; and none of these apply to the trustees in this case. The defendants' counsel submitted that the purpose of the injunction is not to make plaintiffs a secured creditor. On the question whether there are serious issues to be tried, I have no hesitation to say that there are. This involves namely the question of interpretation and construction of various clauses in the Trust Deeds and their Regulations and also in the manner the accounting procedure was undertaken as to the deductions — as the defendants claimed, that the deductions were merely accounting procedures. There is also the issue of the validity of regs 5(2) and 7(1)(c) of the 1976 Deed vis-a-vis the Employees Provident Fund Act 1991 and its predecessor the 1951 Act.

[14] As to the balance of convenience, I have no doubt that D1 and D2 would in any event be able to meet its obligations. The sum of RM50m compared to the Dl and D2 audited annual income is a small sum. But that is not really the point in this case. The issue here is that the plaintiffs are claiming against the Fund and the Trustees. The Trustees have no control or authority over funds which have not been paid into the Funds, and was still in the hand of Dl and D2. So in my view, it is the assets that are within the Funds that matters. As to the undertaking in exh M, this I think must be seen in the light of cl 30(1) and cl 31(1) of the 1968 and 1976 Deeds respectively, which says that the former members (plaintiffs included) have rights only against the Funds and the Trustees. There is no undertaking given by the Trustees. I think it is also important that the Trustees give similar undertaking. It is also to be seen from exh N that D1 and D2 did not appreciate the concern of the plaintiffs' claim. In my view this may be explained away by looking at the defendants' first affidavit in which it was deposed that everything regarding the plaintiffs' claim must be considered only within the four corners of the two Deeds of 1968 and 1976. Thus the defendants insist that they were correct in their interpretation and construction of cll 5 and 7 of the Deed.

[15] But what is puzzling is D1 and D2's reluctance to give full disclosure of the true state of the Funds — its assets and liabilities. In my view the plaintiffs are entitled to such information because by virtue of cll 30(1) and 31(1) of the 1968 and 1976 Deeds the plaintiffs have no right to sue D1 and D2 directly for the retirement benefits without also naming the Fund and Trustees as a party. If there is a short fall in the Funds to meet the retirement benefits' obligations then it is the Trustees who have to approach D1 and D2 for the contribution because the Trust Deeds were entered between D1, D2 and the Trustees.

[16] On the appointment of a receiver, I will adopt the principle in *Cummins v Perkins* [1899] 1 Ch 16. The defendants' counsel argued that in that case judgment was already given. I think it makes no difference. The principle I think is that if the plaintiffs are entitled to be paid from the Funds then they can have the injunction and the court may appoint a receiver to give effect to the injunction. In this case the plaintiffs obviously have a right to the Funds if the plaintiffs' interpretation and construction of the Deeds is correct. This is the triable issue. But I do not believe that the receiver if appointed should be given the same powers and authority as the Trustees in managing the amount of money from the Funds that is to be set aside for the purpose of the plaintiffs' claim. It must be remembered that the Trustees are entrusted with the duty of determining who are the members entitled to receive the retirement benefits from the Funds and as well as to ascertain the amount of the entitlement and then to distribute them accordingly. The receiver that is to be appointed, in my opinion, is not required to do all these at least not until the plaintiffs have successfully proved their case. This is so because the plaintiffs are former members of the Funds and they are not concerned with the current payment out from the Funds as long as adequate sum has been set aside to meet their claim if successful.

[17] On the test of Mareva injunction, the defendants' counsel says there is no dissipation of the Funds. Payment out to current members upon closure is allowable under the Deeds and therefore there is no dissipation. But the point is, I think, once the whole fund is paid out there is nothing left for the plaintiffs to claim on.

[18] As to the argument that the application/order to be given is oppressive, it relates in my view to the argument that if the order is granted D1 and D2 may not be able to close the Funds and distribute the funds to current members upon its closure. I do not think there is any basis in this. The plaintiffs' only request is that a certain sum namely RM50m be preserved/kept in the Funds to meet the plaintiffs' claim. The fact that no proper account of the Funds is made available either to the court or to the plaintiffs makes it difficult for the court to evaluate the extent of the oppression to the defendant, if any, by granting the order.

[19] The plaintiffs are not claiming any extra contribution from D1 and D2 to the Funds to meet the claim. The plaintiffs are only claiming the sum which is already supposed to be part of the assets of the Funds. In my view if a proper account is taken of the Funds and is disclosed to parties and if it

is shown that the Funds at the date of filing of this suit has to its credit a sum in excess of RM50m then the defendants are at liberty to distribute the excess to the current members in order to effect the closure of the Funds and retain only RM50m in the Funds for the purpose of the plaintiffs' claim.

[20] I am also of the view that if the order is granted there would not be any loss or damage to D1 and D2. If ordered, the sum of RM50m will be kept in an interest bearing account. In the event the plaintiffs fail in this suit, the money together with the interest thereon shall be credited back to D1 and D2 to be disposed of in any manner they wish according to the terms of the trust Deeds.

[21] On the above reasoning the application in encl (32) is allowed in respect of prayers (1), (2), (3), (7) and (8). Prayers (4) & (6) are refused. There is no necessity to give the receivers the same powers as the trustees.

[22] As to prayer (3), parties, by consent, are to attend court on 12 April 2004 for a decision on whether or not to proceed with the appointment of the receiver at 2.30pm

Part of the application allowed.

Reported by Visahini Ganesan